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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.

Petitioners,

v.

KATIE MAE ANDREWS, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF EQUAL RIGHTS ADVOCATES, INC. AND AMERICAN CIVIL LIBERTIES UNION

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NOTE: All references to the testimoney of Superintendent Pettey hereinbelow are marked "P.T." (Pettey Transcript); all references to the testimony of Mrs. McCorkle hereinbelow are marked "Mc.T." (McCorkle Transcript).

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MOTION FOR LEAVE
TO FILE BRIEF AMICI CURIAE

Equal Rights Advocates, Inc. and the American Civil Liberties Union respectfully move for leave to file a brief amicus curiae in this case. Respondents have consented to the filing of this brief. The letter of consent accompanies this motion and brief, for filing with the Court. Counsel for amici has sought the consent of petitioners to the filing of this brief, by telephonic and written correspondence. As of the time of preparation of this motion, counsel for petitioners has not responded to said requests for consent.

Equal Rights Advocates, Inc. is a non-profit, tax-exempt legal and educational corporation dedicated to promoting equal rights of men and women under law. Equal Rights Advocates, Inc. devotes substantial amounts of time, energy and resources to advancing the constitutional and statutory rights of men and women to be free from unlawful sex-based discrimination in employment.

Lawyers for Equal Rights Advocates, Inc. have participated in a number of cases challenging laws, policies and practices that operate to disadvantage the female child-bearer, including Geduldig v. Aiello, ___ U.S. ___, 94 S.Ct. 2485

(1974), which upheld the denial, against a fourteenth amendment challenge, of state disability benefits to women disabled by "normal" childbirth, and Berg v. Richmond Unified School District, ___ F.2d ___ (9th Cir. 1975), which affirmed a Title VII decision adjudging the school district's policies as to maternity leave and accrued sick pay to be violative of the Act. Lawyers for Equal Rights Advocates, Inc. served as amicus curiae in Liberty Mutual Insurance Co. v. Wetzel, No. 74-1245, now pending before this Court, and in Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975), also now pending before this Court sub nom General Electric Co. v. Gilbert.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to defend-

ing the rights of all persons to equal treatment under the law. Recognizing that confinement of women's opportunities is a pervasive problem at all levels of society, the American Civil Liberties Union has established a Women's Rights Project to work towards the elimination of gender-based discrimination.

Lawyers associated with the American Civil Liberties Union Women's Rights Project presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later as amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 421 U.S. 772 (1975), and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and the petitioners in Struck v. Secretary of

Defense, 461 F.2d 1372 (9th Cir. 1971, 1972), cert. granted, 409 U.S. 947, judgment vacated, 409 U.S. 1071 (1972), and Turner v. Department of Employment Security, ___ U.S. ___, 96 S.Ct. 249 (1975), and acted as amicus curiae in this Court in several other gender discrimination cases.

The American Civil Liberties Union believes that this case poses an issue of great significance to the realization of full equality between the sexes. It concerns women's right to aspire and achieve in accordance with their talents and capacities as individuals, their right not to be caged, in lump fashion, by an indurate classification that relegates them to inferior status in society.

Equal Rights Advocates, Inc. and the American Civil Liberties Union seek

to participate in this case as amici curiae because each organization views the achievement of fair and even-handed treatment of mothers in public employment as basic to the efforts of amici to win equality for working women

Equal Rights Advocates, Inc. and the American Civil Liberties Union believe that the within brief will be of assistance to the Court in resolving the crucial issues before it. The brief offers an historical analysis of the treatment of mothers of "illegitimate" offspring, and it discusses the issues raised by petitioners' exclusion of this group from employment, insofar as the fourteenth amendment's guarantee of equal protection to these persons is concerned.

For these reasons, we respectfully request leave to file the within brief

amicus curiae.

Respectfully submitted,

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An Attorney for Movants

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OCTOBER TERM, 1974
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BRIEF AMICI CURIAE

INTEREST OF AMICI

The interest of amici is set forth in the preceding motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici support the position that the policy of petitioners is criss-crossed with constitutional defects, any one of which should prove fatal to it: it discriminates against Black persons on account of race; it infringes grievously upon the rights of privacy and procreative choice; it arbitrarily deprives persons of employment in a fashion causing unconscionable risk and harm to children, including economic suffering and personal shame; and, it discriminates against women on account of sex. Because of the gravity and complexity of the sex discrimination issues raised by this case, we will focus predominantly upon those issues.

For many centuries and across diverse cultures, campaigns have been

conducted through law to prevent child-bearing and child-rearing outside societally respected relationships. Keeping women in their place has frequently been a concern of these campaigns, and women have historically suffered myriad punishments under these sex-discriminatory schemes. The grave problem of employment discrimination against women persists. The policy of petitioners aggravates that problem and activates its worst consequence: poverty. Petitioners' policy excludes from employment a group of women whose work affords not only a resource to society that must be saved from the waste of discrimination, but which affords the means of economic self-sufficiency to these women and their families. (Section I)

On its face, petitioners' policy consists of a prohibition against employ-

ment of unwed mothers. Founded upon expressly sex-discriminatory instructions to the personnel agent, rooted in the avowed purpose of excluding persons who are identifiable by the fact of their parenthood as "bad role models", and structured in the context of state laws that empower male parents to avoid the exclusion from employment, the face of petitioner's policy plainly contains a sex-based classification. (Section II-A).

Under the policy, five females and no males have been excluded from employment by petitioners. Even were facial neutrality attributed to the policy, its application has been, and is assured by its structure to continue to be, sex-discriminatory against women. (Section II-B).

The sex-discriminatory nature of

petitioners' policy offends the equal protection clause. The policy finds no rational foundation in petitioners' "role model" theory, insofar as the policy's focus and structure immunize most offenders of the "role model" premise from the exclusion from employment. The policy bears neither a fair nor a substantial relationship to any legitimate aim of public school authorities. Additionally, in their utilization of female sex as the cutting edge of their categorical exclusion from employment, petitioners have drawn a line which, for equal protection purposes, merits strict scrutiny by this Court. (Section II-C).

I. PETITIONERS' POLICY REPRESENTS A SEVERE HISTORICAL RETROGRESSION, AGAINST THE PRINCIPLE OF ENDING SEX DISCRIMINATION UNDER LAW.

A. The History of Anti-Illegitimacy Measures Is Thematically Linked To Discrimination Against Women.

The concept of "illegitimacy" has varied in its legal dimensions across cultures and eras, shaped and reshaped by diverse societal, religious and economic views of human sexuality and by different and changing norms of manhood, womanhood and childhood. With this pervasive variability, one constant appears: where legal and moral authorities have punished the offspring of sexual intercourse occurring outside the bounds of approved relationships, those authorities have likewise punished the maternal biological parents of these children, and

vice versa.

A dramatic and appalling example of this interaction lies in the experience of mothers and children under the English Poor Law Amendment Act of 1834, which purportedly sought to prevent false accusations of paternity by removing the financial responsibilities of putative fathers, while in fact sanctioning the mothers of "illegitimate" children through severe financial penalties. The Act resulted in a crystallization of

> "... the popular view of the day, that it was the woman with an illegitimate baby who was guilty of succumbing to temptation and the man was not to be equally blamed... it had been decided that erring women should suffer to the full consequences of a 'fall'". 1/

1/ D. Dewar, Orphans of The Living: A Study of Bastardy 20-21 (1968).

One apparent consequence of the Act was infanticide. Around the time of the Act's imposition of severe penalties upon mothers of illegitimate children, Benjamin Disraeli, in his sociologically informed novel, Sybil, observed in 1845:

> "Infanticide is practiced as extensively and as legally in England as it is on the banks of the Ganges...". 2/

Social and economic suffering for the mothers and children affected were the alternatives to abortion, infanticide and the anonymous delivery of infants to foundling homes in which many died.3/

2/ As quoted in W. Langer, "Europe's Initial Population Explosion", 69 American Historical Review 1-17 (1963).

3/ The practice of anonymous abandonment of infants was by no means confined to "illegitimate" mothers, for "... the statistics show that of the thousands of children thus abandoned, more than half were the offspring of married couples." Id. at fn 5/.

In eighteenth century rural France the phenomenon of "illegitimacy" was a great deal less statistically common than it was in England, but the socio-economic situation of the unmarried French mother was similar; it has been described by at least one famous demographer as "exceptional and difficult."4/ Heavy social, legal and moral stigmatization of "illegitimacy" in France and in England had completely opposite effects upon "illegitimacy" rates -- a telling comparison, in the context of petitioners' recited purpose of deterring teenage

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4/ P. Goubert, "Legitimate Fecundity and Infant Mortality in France During The Eighteenth Century: A Comparison", reprinted at 97 Daedalus 593-594 (Spring, 1968)(Historical Population Studies).

"illegitimate" pregnancy [5].

Severe punishments including death itself have been visited upon mothers of "illegitimate" children, motivated and justified by [6] vindication of what is commonly called "the double standard" of sexual morality, under which women must

[5] Superintendent Pettey testified below that "(I)n Drew, we have had in the last two years... an alarming number of school girl pregnancies... I think that this is a problem that we as school people, responsible for the development of children, should try to do something about." (P.T.8, 9).

[6] As of 1964, in countries around the region of Togo, the unmarried mother "... is often considered as having brought shame and dishonour to the whole family and as a result, in extreme cases, is murdered by her brother or her father while no punishment or hardly any is imposed on the man involved." United Nations, Document #ST/TAO/HR/22 at paragraphs 134-135 (1964). Refer also to note 12/, infra. Death is the penalty for "illegitimate" maternity in other regions as well. S. Hartley, Illegitimacy 12 (1975).

remain virginal and uninformed about sexual matters until marriage, obedient and ignorant of matters such as contraception within marriage, hostile toward divorce and infidelity, and generally ashamed of and displeased about sexual intercourse.[7]

[7] In 1880, the Reverend William John Knox Little summarized many of these aspects of woman's place under the double standard of sexual morality as follows: "God made himself to be born of a woman to sanctify the virtue of endurance; loving submission is an attribute of a woman; men are logical, but women, lacking this quality, have an intricacy of thought. There are those who think women can be taught logic; this is a mistake. They can never by any power of education arrive at the same mental status as that enjoyed by men, but they have a quickness of apprehension, which is usually called leaping at conclusions, that is astonishing. There, then, we have distinctive traits of a woman, namely, endurance, loving submission, and quickness of apprehension. Wifehood is the crowning glory of a woman. In it she is bound for all time. To her husband she owes the duty of unqualified obedience. There is no crime which a man can commit which justifies his wife in leaving him or in applying for that monstrous thing, divorce. (continued on page 11)

Under this "double standard", men are expected to be sexual teachers of their virginal wives, and their sexual experi-

7/(Con't)
It is her duty to subject herself to him always, and no crime that he can commit can justify her lack of obedience. If he be a bad or wicked man, she may gently remonstrate with him, but refuse him never. Let divorce be anathema; curse it! curse this accursed thing, divorce; curse it! curse it! Think of the blessedness of having children. I am the father of many children and there have been those who have ventured to pity me. 'Keep your pity for yourself', I have replied, 'they never cost me a single pang'. In this matter let women exercise that endurance and loving submission which, with intricacy of thought, are their only characteristics." Reprinted in E. Hecker, A Short History of Women's Rights 151-152 (Putnam, 1910).

ences outside matrimony are to be condoned, because the blame for such experiences is upon the immoral, seducing female.[8/]

To adherents of that double standard of human sexual behavior, the mother of "illegitimate" offspring symbolizes defiance of the moral order: she is a woman who is publicly known not to be virginal and she is unmarried. So she has been the bearer of many and diverse punishments, often involving deprivations upon her child or children, intended to make her suffer for her violation of the double standard. Even where the child is not the direct object of punishment,

8/ O.S. Fowler, Perfect Men, Women and Children 180 (1878); Mark Twain, Letters From The Earth 40 (1962).

the child too suffers:

> "... illegitimate pregnancy is in itself a great blotch upon a woman's virtue. Hence, in so far as the child identifies himself with his physical mother -- as he is bound to do in our culture -- he will profoundly be affected by the knowledge of his illegitimacy...". 9/

Under the double standard of sexual morality, the woman who does not dedicate herself solely to child-rearing within marriage has been viewed by religious, social and legal authorities as a violator of the basic natural order of

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9/ Davis, "Illegitimacy and the Social Structure", 45 Am. J. Soc. 215, 228, 231-233 (1939).

humanity.10/ The double standard is thus preserved where women are relegated to giving to society, and to receiving from it, only those values afforded by marriage and family roles; other kinds of exchanges of values between woman and society --

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10/ "It has often been said that a person born out of wedlock, the parents of that person (the mother much more so than the father), and sometimes the entire family of the mother, suffer a stigma as the result of the nature of the birth. Words as strong as 'discredit', 'disdain', 'shame', 'contempt' and 'condemnation' have been used to describe that stigma. When it exists, it impairs the social position, not only of the person born out of wedlock, but also the mother, thus constituting for her an obstacle to the realization of a normal life in the community in which she lives." Secretary of the United Nations, Report: "The Status of the Unmarried Mother: Law and Practice" 56 (1971).

including education, non-domestic employment, voting, office-holding, jury service and ownership of property -- have been publicly disapproved and legally prohibited.[11/]

In the eighteenth and nineteenth centuries, Western political and religious authorities battled openly against movements for equal rights for women, positing that legal freedom of women would lead to the demise of marriage and family

11/ A summary of these legal disabilities may be found in L. Kanowitz, Women and the Law: The Unfinished Revolution passim (1969). More detailed discussions are presented in Davidson, Ginsburg and Kay, Sex-Based Discrimination (1974) and in Babcock, Freedman, Norton & Ross, Sex Discrimination and the Law: Causes and Remedies (1975).

structures.[12/] For example, the Church of England campaigned against contraception as part-and-parcel of its opposition to

12/ W. Chafe, The American Woman 5, 9-11 (1972); Hankins in "Illegitimacy: Social Aspects", 7 Encyclopaedia of Social Sciences 579, 580-81 (1932) states in part: "Viewing woman as the chief source of sin Christianity tended to degrade motherhood, to accentuate masculine supremacy and to maintain a double standard of morality. It thus inflicted an often unbearable cruelty upon the unmarried mother and an almost certain degradation upon her off-spring. In medieval and early modern times the mother was often required to confess her sin before the congregation in both Catholic and Protestant Communities; and she was sometimes fined, sometimes publicly whipped, sometimes placed in stocks, and the child was neglected and socially ostracized, while the father suffered little or no penalty."

the emancipation of women.[13] Those who spoke of contraception as a means by which the status of men, women and children might be improved were scorned and cast out for their radicalism.[14] The idea that

13/ "The Church of England was slower to face the challenge presented by new social conditions -- particularly the growing demand for women's emancipation -- and was more reluctant to change its traditional doctrine about sex, marriage and the family... Regret was expressed at the decline of the birth rate among English-speaking peoples, especially the upper and middle classes, and it was suggested that many physical and mental diseases might be a direct consequence of the use of contraceptives. The bishops (footnotes omitted), having denounced birth control as "preventive abortion", recommended that all contraceptive appliances and drugs be prohibited by law and their advocates prosecuted." F. Campbell, "Birth Control and The Christian Churches" 14(2) Population Studies 142 (1960).

14/ See for example the discussion of Francis Place's paper of 1822, entitled "To The Married of Both Sexes of the Working People", at G. Hardin, e.d., Population, Evolution and Birth Control 192-193 (1969).

contraception, abortion and "illegitimate" pregnancy directly violated the proper role of women and together threatened the institution of marriage itself was also given voice by medical professionals, inspired by religious campaigns against female social and legal equality.[15]

15/Isaac Pierce, M.D., writing for the Medical and Surgical Reporter in 1888, states in pertinent part:
"Every man knows the horrors of illicit love and the suffering of misguided though patient and confiding women; no man is insensible to the lifelong shame of a child thrown upon the world without knowing a father, and no man denies the wickedness of criminal abortion. No medical man doubts the suffering, and in many cases permanent injury, of the woman who practices abortion that she may shield herself and her destroyer from the condemnation of the world...

Let it become generally known that the medical profession countenances a preventive even in a few cases, and there is reason to fear this will be stretched to a license which will work much mischief to women who are already experimenting in this direction, who have no reason why they should not fulfill the God-given function which makes happy homes, and who are now only held in check by the judgment of the world."Pp. 614-616.

Integral to preservation of the model of the adult female as fit only for the roles of wife and mother were drastic constraints upon her access to the educational system in this nation. From the inception of the educational system of this nation, the opportunities of women for employment in that system have been profoundly and consciously manipulated because of their female sex, marital and maternal status. This pattern of manipulation, commencing with total prohibitions against female teachers[16/] and reaching almost to the present through categorical restrictions upon employment of pregnant teachers[17/], has been con-

16/ R. Callahan, An Introduction to Education In American Society 383-384 (1956).

17/ Brief Amicus Curiae For The National Education Association et al., in Cleveland Board of Education v. LaFleur, Sup. Ct. No. 72-777, at pp. 10-14 (1972).

sistently intertwined with vindication of the above-described double standard of human sexuality and the "woman's place" model of female rights and responsibilities.

So it was that prior to 1830, the United States' public teaching profession was composed almost exclusively of men.[18/] A movement to include women as teachers, commencing in the 1830's and culminating in a great influx of women into the teaching profession during the Civil War, contributed demonstrably to the general enhancement of women's employment opportunities, and increased public respect for the social contributions of women.[19/] Married women were nonetheless widely prohibited from teaching and related occupations until World

18/ W. Elsbree, The American Teacher 199 (1939).

19/ Id. at 201-207.

War I, [20] and many such prohibitory laws and policies were re-established after World War I[21] and again after World War II.[22] The fundamental basis of these exclusions appears to have been an admixture of sentiments about the morally damaging and hazardous influence of married women upon students[23] and sex-

20/ C. Atkinson & E. Maleska, The Story of Education 346-347 (1965).

21/ I. Woody, A History of Women's Education In The United States 509, 513 (1966).

22/ Id.

23/ "The employment of married women teachers in the public schools of the United States has ever been a controversial question. Custom has long decreed that the school ma'am be celibate and most school boards not only refuse to employ married women, but also stipulate that the employed unmarried teacher must resign her position as soon as she becomes a wife." Donovan, The School Ma'am 57 (Stokes Co. 1938).

based economic notions about male breadwinning and female domesticity in family structure.[24]

Like their historical predecessors, who first excluded all women, and who next excluded married women, from teaching and related occupations, petitioners in this case claim that their policy is designed solely to improve the moral stmosphere of schools by removing women who have chosen a course of personal conduct that is believed to convey a bad

24/ "Opposition to the employment of married women as teachers is generally recognized as stronger in smaller rather than larger city systems. In smaller communities there still prevails the traditional attitude that woman's place is in the home, that her husband is expected to provide an income for the maintenance of the family, and that his prestige depends upon his ability to do this." Id at 60.

example to students. In this way, petitioners' policy joins a long line of sex-discriminatory laws, policies and practices, purportedly directed at manipulating the image of women in public education in order to transmit a particular moral philosophy to students.

B. Petitioners' Exclusion Of Unmarried Mothers From Employment Menaces The Achievement Of Equal Opportunity By Women.

Proposals to create equal employment opportunities without regard to sex are at least as ancient as Plato's Republic.[26/] Alongside such philosophical ideas about the means to equality, the reality stands that:

> "...(n)o society has restructured both the occupational system and the domestic establishment to the point of modifying the old division of labor by sex." 27/

As Justice Brennan observed in the plurality opinion in Frontiero v. Richardson,

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26/ In Chapter XV, Socrates explains how the principle of equality of the sexes should work. F. Cornford trans., The Republic of Plato, 144-155 (1966).

27/ K. Davis, "Population Policy: Will Current Programs Succeed?", 158 Science 736-737 (1967).

411 U.S. 677 (1973), sex discrimination in employment continues to confront women in the United States, in spite of legislative and judicial efforts to overcome it.

The notion that women can avoid employment discrimination because women are free to forego the non-domestic working world has little validity in this country, where a substantial and increasing proportion of the female population works outside the home out of sheer economic necessity.[28/] In families whose sole breadwinners are females, the economic need to work is obviously most intense. Yet the very families whose livelihood is

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28/ As of 1970, there were 5.6 million families headed by women in the United States, of which almost one-third had family incomes below the poverty line of $3,700 for a family of four. R. Stein. "The Economic

cut off by petitioners' exclusion of mothers of "illegitimate" children from employment are within this most economically needy group.

There can be no doubt that access to employment free from invidious discrimination has paramount significance in the realization of equal employment opportunity under law. Petitioners' exclusion strikes multiple blows against the unmarried mother whose employment provides her family's livelihood: the excluded mother is deprived of economic self-sufficiency; she is foreclosed from making the contribution to society that her work affords; not only is the principle of equal opportunity violated, but the means

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28/ cont'd.
Status of Families Headed By Women", in U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review (Dec. 1970).

of making that principle real and of giving it meaning - employment - is taken from her by petitioners, for the rest of her life.

II. PETITIONERS' POLICY DISCRIMINATES AGAINST FEMALES IN VIOLATION OF THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION.

A. Petitioners' Policy Is Facially Sex-Discriminatory.

Amici contend that the policy of petitioners herein at issue warrants treatment by this Court as a facially sex-discriminatory policy, for four reasons. First, the actual phrasing of the unwritten policy, effectuated in the form of an oral instruction to exclude unwed mothers from employment, contained that sex-based classification. Second, regardless of the wording of the unwritten policy, it was designed and structured in direct reliance upon the greater identifiability of

mothers than of fathers of "illegitimate"[29/] children. Third, under Mississippi law, fathers may take action to legitimate their children born out of wedlock, thus escaping the exclusion from employment, whereas mothers are legally incapable of doing so. Fourth, the declared purpose and the method of enforcement of petitioners' policy assure that it will not reach and exclude male parents of "illegitimate" children from school district employment.

The record in this action fully sustains the position that petitioners' policy was articulated to find and exclude

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29/ In 1945, Justice Schauer of the California Supreme Court opined that it would seem fairer to refer to the offspring of unmarried parents as the morally neutral children of "illegitimate parents". Estate of Lund, 26 C.2d 472, 159 P.2d 643 (1945). Amici have placed the term "illegitimate" in quotation marks throughout this Brief because they

from employment a class composed solely of women. Under cross-examination, Superintendent Pettey, who designed the policy (P.T. 3), admitted that his instruction to Mrs. McCorkle, who was charged with investigating and recommending certain applicants (P.T. 11), specifically consisted of a prohibition against hiring unwed mothers (P.T. 28) and that he gave Mrs. McCorkle no instructions whatsoever as to exclusion of male applications who had fathered "illegitimate" children (P.T. 23-24).

Moreover, there is a compelling reason to define the face of petitioners' policy as consisting of the exclusion of unwed mothers from employment. Because

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29/ cont'd.
believe that, whatever group the term is used to modify, it invites injustices. (See Section I, above.)

the policy remained an unwritten one to and through the trial below, for this Court to define the face of the policy as consisting of the phrasing given to it in the adversary context of litigation, by its defenders, would work a serious mischief. Such a judicial definition of the policy's face would encourage governmental authorities to propound unwritten policies containing overtly discriminatory classifications, and subsequently to give clear and neutral-seeming phraseology to such policies only if and when challenged under the Constitution. Cf. Niemotko v. Maryland, 340 U.S. 268 (1951). Even the more neutral-seeming phrasings[30/] of the policy

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30/ At one juncture Superintendent Pettey stated that the policy excluded unwed parents. (PT 23,24.) At a second juncture he stated that the policy excluded parents of illegitimate children (P.T. 3, 15.) At a third juncture, as discussed hereinabove, Superintendent

do not redeem it from its facially sex-discriminatory character.

Both in structure and in the purported justification of their policy, petitioners have relied directly and impermissibly upon the greater identifiability of mothers than of fathers.[31/] Indeed, in their

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30/ cont'd.
Pettey indicated that he instructed Mrs. McCorkle to exclude unwed mothers. (P.T. 28.)

31/ In the case of Sanders v. Tillman, 245 S.2d 198 (Sup. Ct. Miss. 1971), which offers the most recent definition of "legitimation" under Mississippi law, the Supreme Court of Mississippi observed in relevant part: "It is a simple matter to prove the maternity of an illegitimate child, but is infinitely more complex and difficult to prove the paterntiy. It is only necessary for the father to be present at the laying of the keel, not at the launching of the ship. The mother must be present at both, and it is not at all difficult to prove who launched the ship." 245 S.2d at 200.

answer to the complaint, petitioners asserted that:

> "...the regulation bears only upon the Plaintiffs' open and notorious display of a status which is within the province of the school district to regulate in determining who may teach." (Answer, p. 3, ¶XV.)

Generally only mothers would be capable of such open display of unwed parenthood in this culture. (It bears emphasis that, as a matter of record, none of the respondents in this case was at any time engaged in any display whatsoever of her status as an unmarried parent; to the contrary, agents of petitioners affirmatively searched for information as to the marital and parental statuses of the respondents. (P.T. 9, 10, 28, 29; Mc.T. 13, 23, 24, 36, 37, 42)).

Furthermore, to the extent that petitioners are referring to the status of being a childbearer out of wedlock, it

must be considered that no father is capable of such a status. To the extent that the policy refers to the fact of child-rearing, it must further be considered that unwed fathers in this society do not generally rear their children.[32/] Finally, while Mississippi law provides a means by which a father may legitimate his offspring born out of wedlock, no such legal means is available to the mother; the father may marry the mother and acknowledge the child, rendering it legitimate.[33/] Thus it emerges that petitioners' policy, insofar as it purportedly excludes parents of "illegitimate" children from employment, operates in a context of state laws that

32/ See footnote 36, infra.

33/ Cf. Sanders v. Tillman, footnote 31, supra; see also, Nichols v. Sauls' Estate, 165 S.2d 352 (Sup. Ct. Miss. 1964).

empower fathers, and not mothers, to legitimate their children and thus to avoid exclusion from employment.[34/]

The structure of petitioners' policy inexcusably disfavors the female parent vis a vis the male parent, even aside from its tandem operation with Mississippi's laws governing legitimation. This Court fully realizes the statistical infrequency of the phenomenon of single male persons who are the custodial parents of children.[35/] Within this phenomenon, the father who is the custodial parent of his child conceived and born out of wedlock must be uncommon

34/ In several states, acknowledgement by the father without marriage accomplishes full legitimation. H. Krause, Illegitimacy: Law and Social Policy 19 (1971).

35/ Cf. Stanley v. Illinois, 405 U.S. 645 654-656 (1972).

Court find that policy of denying employment to unwed mothers, while allowing unwed fathers to teach, violates the most stringent test of equal protection.

CONCLUSION

For all of the foregoing reasons, as well as those urged by respondents, the decision of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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indeed.[36/] Thus, by its reliance upon the fact of custody to locate parents of "illegitimate" children, the structure of petitioners' policy excludes fathers by means of the virtual impossibility of locating a male custodial parent of an "illegitimate" child.

Petitioners have made two essentially irreconcilable contentions about the

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36/ Id. As of 1970, 98.67% of all persons under 18 years old in the United States were living either with both parents or with a female head of family. U.S. Bureau of the Census, 1 Characteristics of the Population Table 54, p. 1-278 (1970). Only 0.2% of all persons under 18 years old were living with fathers who were single (i.e., never married, separated, widowed or divorced). U.S. Bureau of the Census, Subject Reports: Persons By Family Characteristics 1 (1970).

relationship between their policy and the group of female parents of "illegitimate" children excluded thereby. On the one hand, petitioners claim that males and females who engage in conduct resulting in the birth of an "illegitimate" child are equally bad role models in instructional contexts, and that they are therefore equally subject to the exclusion from employment under that ostensible purpose. On the other hand, as the portion of the answer quoted above (see text after footnote 31) emphasizes, and as District Court Judge Keady below observed:

> "Defendants argue that when a single woman engages in premarital sexual relations, become pregnant and begets an illegitimate child, she voluntarily places herself in a classification in which men are not similarly situated, and hence, a regulation which treats women differently is justified." 371 F.Supp. 26, 36.

Thus, there is little doubt that petitioners' policy, by its language, structure, method of enforcement and declared purpose of regulating "open and notorious display" of the status of unwed motherhood, treats women differently from men. In terms of petitioners' own position that both parents of "illegitimate" offspring are bad role models in instruction contexts, the sex-differential compass of petitioners' policy, which encircles mothers and omits fathers of "illegitimate" children, is unjustifiable.

B. As Applied, Petitioners' Policy Discriminates Against Women.

The factual record in this action underscores the sex-discriminatory fashion in which petitioners' policy has been administered. The assertion that the policy is to be applied to both sexes is belied on the face of the record: under the policy, five females and no males have been excluded from school district employment (M.c.T. 14, 20, 42). Section II-A demonstrated that petitioners' policy is structured to find and exclude women. Amici contend that this "women only" result should therefore be viewed as the utterly predictable consequence of a facially discriminatory classification. However, even were the policy deemed fair and neutral on its face as to the sex of persons to be excluded from employment, the policy

represents a classical situation of discriminatory application.

The doctrine that illegal discrimination accomplished by application of a neutral-seeming law will not be countenanced is a long-standing element in the strength of the United States Constitution. Yick Wo v. Hopkins, 118 U.S. 356 (1886). As in Yick Wo, the Court here is confronted by a record evincing a wholly unequal application, as between persons similarly situated, of a governmental prohibition materially affecting those persons' rights. The administration of petitioners' policy invites and assures continuation of this unequal application, in that petitioners have depended frontally upon the reality, rooted in biology, state law and maternal custody patterns, that mothers of "illegitimate" children are

usually identifiable and excludable where fathers, similarly situated under the purported purposes of the policy, are not. As in Yick Wo, the petitioners' policy here has been unequally and discriminatorily administered, and it must fall.

C. Petitioners' Policy Fails Every Test Of Equal Protection To Be Guaranteed To Women In The Context Of Public Employment.

Both on its face, and as applied to respondents, petitioners' policy achieves a discrimination against women as mothers of "illegitimate" children. That discrimination is wholly unjustifiable under the Fourteenth Amendment guarantee of equal protection.

The policy of petitioners does not begin to fulfill the rigorous rational basis test of equal protection to women and men propounded by this Court in

Reed v. Reed, 404 U.S. 71 (1971). As Chief Justice Burger reasoned therein:

> "The Equal Protection Clause... does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." Id. at 76-77.

Petitioners have insisted that the purpose of their policy is to exclude from instructional employment persons who, by virtue of their participation in out-of-wedlock sexual intercourse that results in "illegitimate" births, are immoral role models for students.

Petitioners' policy bears neither a fair nor a substantial relationship to the policy's declared purpose, as required for equal protection purposes by Reed v. Reed, supra. The criterion of sex is wholly unrelated to the policy's pur-

pose, which is to exclude bad role models from employment. Surely the father of "illegitimate" offspring is as much or as little a bad role model[37/] as the mother; yet, because of his sex, he is outside the policy's structure and enforcement scheme. Thus it appears that petitioners' policy bears no demonstrable relationship to the declared end.

Wholly aside from its discrimination on account of sex, the policy draws a set of arbitrary lines among women, each of which moves the policy further away from the fair and substantial relationship to the governmental purpose which, under

37/ For purposes of the discussion of equal protection herein, amici have assumed arguendo that petitioners' "role model" theory has some factual validity. However, the District Court found that it does not, and there is substantial evidence in the record to support that finding.

Reed, the policy must bear. The pregnant woman who elects abortion, or who abandons or even destroys[38] her infant, is outside the policy; it is only the woman who elects to give birth and to fulfill custodial responsibilities to her offspring whom petitioners' policy excludes from employment. By the "bad role model" theory of petitioners, all of these women are en-

38/ "It bears emphasis that community disapproval and penal sanctions against the mother may intensify the mother's desire to protect her anonymity and rid herself of the infant. Although the incidence of infanticide and abandonment are not as great as they were in Puritan days... the pressure on the modern unmarried mother may result in either illegal induced abortion or anonymous release of the child for adoption." C. Foote, R. Levy & F. Sander, Cases and Materials On Family Law 118 (1966).

compassed[39]; yet the policy arbitrary selects only the last, and excludes her from employment. Along with its irrational line between men and women, these additional lines drawn among women by the policy underscore its lack of relationship to the purpose of excluding "bad role models" from employment.

The case at bar does not require this Court to reach the question, which has at least once divided it, as to the proper jurisprudential status of the category of "sex" for equal protection purposes. Cf. Frontiero v. Richardson, 411 U.S. 677 (1973). Nonetheless, if this Court were to view the policy of petitioners as somehow capable of surviving the substantial rationality test of Reed, we urge

39/ The prospective mother of an "illegitimate" child who elects abortion is a double sinner, in some views. See footnote 15/, supra.

that the reasons for holding sex to be a suspect category, delineated by Justice Brennan in Frontiero v. Richardson, supra, should be found wholly persuasive in the instant case. By the language, structure and method of enforcement of their policy, petitioners have targeted mothers, because of their sex, for exclusion from employment in a fashion that makes these women the direct victims of a poorly designed and ill-considered form of behavioral architecture.[40/] Petitioners'

40/ See Section I. A-B., above. The exclusion from employment of men in order to encourage marriage and procreation would seem to be every bit as ill-considered, although at least one public minister, J.L. Muret of the canton of Vaud, Switzerland, suggested it in 1766, saying "... A means which would seem very efficient, and be the more appropriate since it would enhance population more directly, would be to bar from all employments the non-married men...". J.L. Muret, Memoire sure l'etat de la population dans le pays de Vaud", in Memoires de la Societe Economique de Berne 57 (1766).

policy represents an unwarranted return to the times during which stigmatization of unwed mothers was a tool, along with forced pregnancy, compulsory marriage and deprivation of birth control information, by which women were kept in their legal and societal place.[41/] The policy thus invokes the historical and legal reasons for holding that sex, like race, should be viewed as a suspect category for equal protection purposes. Whatever changes may be promised or predicted on the road to equal opportunity without regard to sex, the stigmatization and exclusion from public employment of women who bear "illegitimate" children can only be viewed as a backward step. Amici urge that this

41/ See fn's 12/, 13/, and 15/, and accompanying text, supra.